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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MAURICE SKOBLOW,

Petitioner,

v.

AMERI-MANAGE, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Does the Eleventh Amendment, or any other constitutional doctrine, confer upon the states immunity from suits brought by their own citizens?

2. Should Hans v. Louisiana, 134 U.S. 1 (1890) or Quern v. Jordan, 440 U.S. 332 (1979), be overruled?

3. Did Congress, in enacting the 1871 Civil Rights Act, intend to authorize section 1983 suits against states in state court?

PARTIES

The petitioner in this Court is Maurice Skoblow. The respondent is Ameri-Manage, Inc., a Florida corporation which the state courts below concluded was, for Eleventh Amendment purposes, an agency of the state of Florida.

In the proceedings below petitioner also sought relief against six individuals: Robert A. Burton, John Pitrelli, Elsa Dominguez, Barbara McMurtrey, Jackie Dale and Paul Uhrig. The claims against those individuals were dismissed on grounds unrelated to the Eleventh Amendment issue which is the subject of this petition.

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v.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

The petitioner, Maurice Skoblow, respectfully prays that a writ of certiorari issue to review the judgments and opinions of the Supreme Court of Florida entered in this proceeding on September 24, 1987 and December 1, 1987.

OPINIONS BELOW

The decision of the Florida Supreme Court is reported at 514 So.2d 1077, and is set out at pp. 1a-4a of the Appendix. The opinion of the Florida District Court of Appeal is reported at 483 So.2d 809, and is set out at pp. 5a-18a of the Appendix. The opinion of the Florida Circuit Court, which is not reported, is set out at pp. 19a-20a of the Appendix.

JURISDICTION

The original decision of the Florida Supreme Court was entered on September 24, 1987. A timely petition for rehearing was denied on December 1, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Section 1983 of 42 U.S.C. provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This action arose out of the dismissal of petitioner from his

employment as a dentist at the South Florida State Hospital. On February 13, 1981, petitioner was summarily fired for alleged "inadequate performance" in carrying out his duties, and was notified that under state law he had no right to appeal that action.[1] Although the notice of dismissal contained no specific charges of misconduct, a subsequent newspaper article quoted various supervisory officials at the state hospital as making a variety of specific and serious charges against petitioner, including taunting patients, use of unsterilized instruments, and performing unnecessary dental work.[2] Petitioner brought this suit in the Florida Circuit

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[1] Third Amended Complaint for Damages, Exhibit B.

[2] Id., Exhibit C.

Court for the Eleventh Judicial Circuit; count II of his complaint, labeled "action under 42 U.S.C. 1983 et seq.," alleged that the defendants had violated his "rights to due process of law guaranteed him by the Fourteenth Amendment to the United States Constitution."[3] Specifically petitioner alleged that he had not been provided "with any notice of the charges made against him ..., nor with the opportunity to be heard on them and to demonstrate their falsity," and that the charges "by their nature stigmatized the [petitioner] and cast a shadow on his professional record and qualifications, and have

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[3] Id. p. 4.

restricted his liberty to seek other employment in his profession."[4]

The complaint named as defendants, in addition to several individuals, Ameri-Manage, Inc.[5] Ameri-Manage is a corporation to which Florida had by contract delegated responsibility for managing the operations of Florida State Hospital. The Hospital Administrator and the 10 other most important administrators at the hospital were technically employees of Ameri-Manage, Inc., rather than of the hospital; aside from this financial arrangement, however, these key administrators acted as hospital staff. The contract authorized

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[4] Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972); Codd v. Velger, 429 U.S. 624, 626-28 (1977).

[5] Id. at 5-6. The complaint also contained a state law claim for defamation. Id. at 1-5.

Ameri-Manage, Inc., to hire and fire hospital employees and to establish the hospital's termination procedures. App. 15a-16a.

The defendants moved in the Circuit Court for partial summary judgment on a variety of grounds, arguing, inter alia, that Ameri-Manage, Inc. was a state agency, and thus could not be sued in a state court section 1983 action because of the Eleventh Amendment.[6] Ameri-Manage, Inc., was represented throughout the state court proceedings by the Attorney General of Florida. The Circuit Court granted the motion, but issued no opinion explaining its decision. (App. 19a-20a). The claims against the individual defendants were ultimately

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[6] Memorandum in Support of Motion for Partial Summary Judgment, pp. 9-14.

dismissed on a variety of grounds not relevant to this appeal. The Florida District Court of Appeal concluded that "Ameri-Manage was operating as an agency of the state at the time of [petitioner's] discharge" (App. 16a), and held that state agencies were immune from section 1983 suits in state court:

> Absent an unequivocal expression of intent by either the United States Congress to overturn a state's eleventh amendment immunity, or a state legislature to waive the state's sovereign immunity, a state and its agencies are immune from civil rights actions brought against them pursuant to section 1983 in both federal and state courts. See Quern v. Jordan....

(App. 12a). The Florida Supreme Court affirmed, holding that Ameri-Manage, Inc., as a state agency, was "immune under the eleventh amendment and the common law from suits arising under the

federal Civil Rights Act, 42 U.S.C. § 1983." (App.4a. The Florida Supreme Court relied in part on its decision in a companion case, Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987).

REASONS FOR GRANTING THE WRIT

A century ago Hans v. Louisiana, 134 U.S. 1 (1890), held that the Eleventh Amendment was not, as its language suggested, a simple repeal of the citizen-state diversity clause of Article III, but constituted a charter for constitutionalizing far broader notions of state sovereignty and immunity. Over the decades which followed the Eleventh Amendment served increasingly as a vehicle for reading into the federal Constitution, and most recently into a variety of federal statutes, restrictions forbidding or limiting suits against

states. Although frequently conceding that the Eleventh Amendment was "not literally applicable" to suits against a state by its own citizens, this Court repeatedly relied on the Amendment, or doctrines of state sovereignty emanating from it, to hold that federal statutes expressly directed at controlling state conduct did not authorize federal suits against the states which violated those laws. Edelman v. Jordan, 415 U.S. 651, 653 (1974); Employees v. Missouri Public Health Dept., 411 U.S. 279, 280 (1973); cf. Parden v. Terminal R. Co. of Alabama Docks Dept., 377 U.S. 184, 186 (1964).

In this case, just as in Edelman, Employees, and Parden, a mere literal reading of the Eleventh Amendment would compel the conclusion that the Amendment is inapplicable, since the action was not

only brought against Florida by one of its own citizens, but was filed in state rather than federal court. The Florida courts, however, using the method of analysis sanctioned by Hans and its progeny, relied on the Eleventh Amendment, as have other state courts, to construe section 1983 to preclude suits against a state brought in state court by citizens of that very state. A number of state courts have gone so far as to hold that the Eleventh Amendment is actually applicable to state judicial proceedings.[7] The decision below

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[7] Mossman v. Donahey, 346 N.E. 2d 305, 315, 46 Ohio St.2d 1 (1976):

> "It appears to this court to remain the law under the Eleventh Amendment that a state may not be sued for damages by an individual under federal law, without its consent, and that this principle applies equally to state as well as

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federal courts."

(footnote omitted).

Gittens v. State, 504 N.Y.S. 2d 969, 973 (Ct. Cl. 1986):

> "[A]ssuming arguendo that the State is a 'person' subject to suit under § 1983 ... the State remains protected by the Eleventh Amendment. I thus hold that an inmate may not bring an action in the Court of Claims alleging section 1983 deprivations of civil rights."

Brody v. Leamy, 393 N.Y.S. 2d 243, 262, and n. 8, 90 Misc. 2d 1, 28 and n. 8 (Sup. Ct. Dutchess Cty. 1977), held that whenever a civil rights judgment against a state official would in fact be paid with state funds, pursuant to a state indemnification law:

> "the court would conclude that upon the instant claim (and solely within the meaning of Section 1983) the state is the real party in interest, and by virtue of the Eleventh Amendment no cause of action exists in any court of this state.... If plaintiff were accorded a trial and prevailed, and, further, if the State paid the judgment by operation of

illustrates the extraordinary results to which Hans and its progeny can lead. Certiorari should be granted to limit the Eleventh Amendment, and its emanations, to cases which fall within the literal language of the Amendment itself.

> statutory mandate, public funds have been expended and the Eleventh Amendment bars the action."

See also id. at 262 (holding, apparently in the alternative, that if the Eleventh Amendment does not literally apply, the state courts should nonetheless utilize Eleventh Amendment rules "by a parity of reasoning" to assure that no relief is available in state court which would be forbidden by the Amendment in federal court). Cf. Pyne v. Meese, 218 Cal. Rptr. 87, 92, 172 Cal. App. 3d 402 (Cal. App. 3 Dist. 1985) (state court section 1983 action not permitted against a state both because "a state is not a 'person' under section 1983" and because "[t]he bar of the Eleventh Amendment has not been eroded"). Several state courts hold that the states enjoy a form of immunity in state court from whatever relief which would be barred by the Eleventh Amendment if the action were brought in federal court. See n. 14, infra.

A quarter century ago all nine members of this Court were of the view that "an unconsenting state is immune from federal-court suits brought by its own citizens as well as by citizens of another State," Parden v. Terminal Railway of Alabama Docks Dept., 377 U.S. 184, 186 (1964), an immunity which the Court then believed had been derived from the Eleventh Amendment by the 1890 decision in Hans v. Louisiana, 134 U.S. 1 (1890). In 1973, however, Justice Brennan, relying on the pre-1890 decisions of this Court regarding the Eleventh Amendment, urged that neither that Amendment nor any other portion of the constitution conferred upon the states any federal-court immunity from suits by their own citizens. Employees v. Missouri Public Health Dept., 411 U.S.

279, 309-24 (1973) (dissenting opinion).[8] In March, 1985, Justice Marshall joined Justice Brennan in urging that the states possessed no such immunity. Oneida v. Oneida Indian Nation, 470 U.S. 226, 254 (1985) (dissenting opinion). Three months later, in June 1985, Justices Brennan, Marshall, Blackmun and Stevens joined in an exhaustive historical analysis of the Eleventh Amendment, which concluded that the constitutional immunity of states applied only to diversity actions brought by citizens of

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[8] See also Yeoman v. Kentucky, 423 U.S. 983 (1975) (dissenting opinion); Edelman v. Jordan, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting); Fitzpatrick v. Bitzer, 427 U.S. 445, 457 (1976) (Brennan, J., concurring); Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 700 (1982) (Brennan, J., concurring in part and dissenting in part); Pennhurst State School & Hosp., v. Halderman, 465 U.S. 89, 125 (1984) (Brennan, J., dissenting).

other states. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 247 (1985) (dissenting opinion). Two of the five justices who made up the Atascadero majority have since retired; Justice Scalia has so far expressly declined to take a position regarding this controversy, Welch v. Dept. of Highways and Public Transp., 97 L.Ed.2d 389, 411 (1987) (concurring opinion), and Justice Kennedy has had no opportunity to express an opinion on the issue.

Thus at this point in time only three members of this Court expressly continue to adhere to the view that the Eleventh Amendment, or some implicit assumption underlying Article III, immunizes a state from federal suits by its own citizens. The plurality view is now to the contrary. This unusual

situation regarding a major issue of constitutional law would be sufficient to warrant review even if further implementation of the majority view in Atascadero were a simple matter. The implementation of the Eleventh Amendment, however, has proved anything but simple; this Court has constantly been closely divided regarding what types of orders violate that Amendment, and what types of statutes lift a state's immunity. See, e.g., Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) (Court divided 5-4 regarding propriety of disputed order; no majority opinion); Papasan v. Allain, 92 L.Ed.2d 209 (1986) (four different opinions regarding propriety of disputed order); Hutto v. Finney, 437 U.S. 679 (1978) (Court divided 5-4 regarding whether Congress

lifted state's immunity). Over the last decade this Court has erected an increasingly complex superstructure of Eleventh Amendment jurisprudence on an ever more shaky constitutional foundation.

In Welch Justice Scalia suggested that the complex questions raised by Hans and its progeny should be deferred until this Court had before it a dispute concerning the interpretation of a statute enacted prior to the 1890 decision in Hans. This is such a case. The question presented by this petition concerns whether a state can be sued under 42 U.S.C. § 1983, originally enacted as part of the Civil Rights Act of 1871. As of 1871 the reigning interpretation of the Eleventh Amendment was that set forth by Chief Justice

Marshall in Cohens v. Virginia, 6 Wheat. 264 382-83 (1821) and Osborn v. Bank of United States, 9 Wheat. 738, 857-58 (1824). Regardless of whether, as Justice Powell urged in Welch, 97 L.Ed.2d at 402 n. 11, the holdings in Cohens and Osborn were dicta, a member of Congress in 1871 would surely have understood those decisions to hold that the Eleventh Amendment had merely repealed the citizen-state diversity clause of Article III, and that the Amendment would thus be of no relevance to cases arising under the statutes and Constitution of the United States. Hans undeniably changed, or began to change all that in 1890, but in 1871 Cohens and Osborn had been adhered to without exception by this Court for almost half a century, and Congress could not have anticipated that

they would be overruled some 19 years later.

While the principle of stare decisis ordinarily militates against reconsideration of reigning constitutional doctrine, Eleventh Amendment jurisprudence has shifted so frequently that it would be inappropriate now to rely on stare decisis to freeze in place a view of the Amendment no longer accepted by a majority of this Court. Hans v. Louisiana, as currently construed, effectively overruled Cohens and Osborn. Edelman v. Jordan, 415 U.S. 651, 670 (1974), overruled Shapiro v. Thompson, 394 U.S. 618 (1969) and three other per curiam decisions. Welch v. Dept. of Highways and Public Transp. overruled Parden v. Terminal Railway of Alabama Docks Dept.

The rule of construction which has derived from Hans, which presumes, absent exceptionally clear evidence to the contrary, that Congress did not intend to subject the states to suit under a given statute, has not proven to be a particularly reliable method of ascertaining congressional intent. The majority's interpretation of the Vocational Rehabilitation Act in Atascadero State Hospital, for example, was, promptly overturned by Congress,[9] as was the interpretation of Fair Labor Standards Act in Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973),[10] and this Court concluded in

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[9] Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807.

[10] 29 U.S.C.§ 216(b) (1987 Cumulative Annual Pocket Part), Pub. L. 93-259, § 6(d)(1).

Welch that it had misapplied that rule in Parden. In any event, the application to an 1871 statute of a rule of construction which is based on the 1890 decision in Hans, and which was not clearly announced by this Court until at least the 1973 decision in Employees, is clearly an anachronism. Quern v. Jordan, 440 U.S. 332 (1979), which held that Congress did not intend to authorize federal courts to hear section 1983 suits against states, reasoned in part as follows:

> [N]either logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compel, or even warrant, a leap .... to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several states.... [N]ot one Member of congress mentioned the Eleventh Amendment.... Our cases consistently have required a clearer showing of

> congressional purpose to abrogate Eleventh Amendment immunity.... § 1983 does not explicitly and in clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history ... which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.

440 U.S. at 342-45. Since the states in 1871 had no Eleventh Amendment immunity in cases arising under the federal question clause of Article III, the failure of the 42nd Congress to "consider ... the Eleventh Amendment immunity of the states" is hardly surprising.

As the extension of Hans has taken the interpretation of the Eleventh Amendment ever further from the actual terms of the Amendment, confusion and disagreements have become increasingly inevitable. The instant case was brought

in state court, a circumstance which should surely have made the Eleventh Amendment entirely irrelevant, since the Amendment concerns only "[t]he judicial power of the United States." The decisions of this Court have repeatedly assumed that a plaintiff could resort to state courts to enforce federal laws against state defendants. In Maine v. Thiboutot, 448 U.S.1 (1980), the Court upheld a state court section 1983 judgment, which directed the state "to pay the correct amounts retroactively" to certain individuals who had improperly been denied AFDC. 448 U.S. at 3. The majority also upheld in Thiboutot an award of counsel fees under the Civil Rights Attorney's Fees Awards Act of 1976, reasoning:

> No Eleventh Amendment question is present, of course, where an

> action is brought in a state court since the Amendment, by its terms, restrains only "[t]he Judicial power of the United States."

448 U.S. at 9 n. 7. Justice White, who had insisted in Hutto v. Finney, 437 U.S. 678, 704 (1978), that the Attorneys' Fees Act did not authorize federal courts to award fees against a state, nonetheless joined the majority opinion in Thiboutot upholding such an award by a state court. In Martinez v. California, 444 U.S. 277 (1980), the Court resolved on the merits a state court § 1983 action against California, without expressing any reservations about whether this Court, or the state courts, had jurisdiction to hear such a claim. See also Private Truck Council of America, Inc. v. Quinn, 90 L.Ed.2d 677 (1986) (White, Brennan and O'Connor dissenting from denial of

certiorari regarding merits of state court section 1983 suit against state).

In those instances in which a majority of this Court has held that the Eleventh Amendment barred a particular cause of action in federal court, the Court has repeatedly asserted that the federal statute at issue was nonetheless enforceable in an action against a state in state court. In Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973), Justices Marshall and Stewart stressed that the Eleventh Amendment in no way limited the enforceability of the Fair Labor Standards Act in state court:

> Section 16(b)'s authorization for employee suits to be brought "in any court of competent jurisdiction" includes state ... courts.... [T]he ...FLSA ... created in these employees a federal right to recover from the state compensation owing under the Act. While constitutional

> limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the States nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights.... [S]ince federal law stands as the supreme law of the land, the State's courts are obligated to enforce it, even if it conflicts with state policy.... I see our decision today, then, as nothing more than a regulation of the forum in which these petitioners may seek a remedy for asserted denial of their rights under the FLSA.... [T]hese petitioners are entitled personally to enforce their federal rights against the State in state forum rather than in federal forum.

411 U.S. at 298.[11] In Pennhurst State School & Hospital v. Halderman, the majority explained that "under Edelman v.

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[11] The majority in Employees noted that the FLSA "arguably" authorized suits in state court, but did not resolve that issue. 411 U.S. at 287.

Jordan ... a suit against state officials for retroactive monetary relief ... based on federal law, must be brought in state court." 465 U.S. at 122. In Atascadero State Hospital v. Scanlon the majority disputed the suggestion that its interpretation of the Vocational Rehabilitation Act would leave without any monetary remedy individuals whose statutory rights had been violated by a state, arguing that "[i]t denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." 473 U.S. at 239 n. 2 (emphasis added).

A substantial number of state courts, including those in Florida, have in fact done precisely what the Atascadero majority insisted state judges would not do, refusing to hear section

1983 claims against state agencies precisely because, under Edelman and Quern, the plaintiff had nowhere to turn except state court. The lower courts, which are in a state of "confusion"[12] regarding whether they must hear such claims, have adopted four quite distinct rules. State courts in Michigan, Nebraska and Alaska have held that states

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12 Ramah Navajo School Bd. v. Bureau of Revenue, 720 P.2d 1243, 1248, 104 N.M. 302 (N.M. App.) ("confusion in the lower courts"), cert. denied, 107 S.Ct. 423 (1988); see also Gumbhir v. Kansas State Bd. of Pharmacy, 646 P.2d 1078, 1083, 231 Kan. 507 (1982) ("the courts are divided on the question" of whether states are "persons" under section 1983); Kristensen v. Strinden, 343 N.W.2d 67, 77 n. 11 (N.D. 1983) ("there is no unanimous consensus among the courts" regarding whether states are "persons" under section 1983); Hampton v. State of Michigan Dep't of Corrections, 377 N.W.2d 920, 921, 144 Mich. App. 794 (1985) ("whether a state or any of its agencies is a 'person' for purposes of § 1983 has been the subject of ongoing debate in both federal and state courts.")

are "persons" within the meaning of section 1983, and can thus be subjected under at least some circumstances, to monetary awards in section 1983 actions.[13] Kansas and New Mexico courts hold that a state is a "person", and subject to a section 1983 suit in its own name in state court, where the plaintiff seeks only prospective relief; in New Mexico courts, however, a state is not a "person" under section 1983 to the extent

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[13] Smith v. State, 122 Mich. App. 340, 350-52, 333 N.W.2d 50, 55 (1983)("we conclude that Congress must have intended that states be included as 'persons' . . . under § 1983"); Maldonado v. Nebraska Dept. of Public Welfare, 223 Neb. 485, 391 N.W.2d 105, 109 (1986) (construing Maine v. Thiboutot to authorize state court section 1983 actions against states); Brown v. Wood, 592 P.2d 1250, 1251 (Alaska 1979) (University of Alaska is a "person" and "can be held liable in a suit under 42 U.S.C. § 1983").

that monetary relief is sought.[14] Decisions in Pennsylvania and North Dakota hold that, regardless of whether a state may be a "person" subject to suit in a section 1983 case, Congress intended that states enjoy complete immunity from

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14 Gumbhir v. Kansas State Bd. of Pharmacy, 231 Kan. 507, 646 P.2d 1078, 1084 (1982) ("where prospective injunctive relief is sought . . . a state agency should be considered a 'person' under the statute . . . . [A] careful reading of Quern reveals that case did not hold states or state agencies could never be considered 'persons' under section 1983"); Ramah Navajo School Bd. v. Bureau of Revenue, 720 P.2d 1243, 1249, 104 N.M. 302, (N.M. App.), cert. denied 107 S.Ct. 423 (1986), ("'where prospective injunctive relif is sought'. . . a state and its agencies may be proper defendants in state court under Section 1983"). This approach was disapproved in Karchefske v. Dept. of Mental Health, 371 N.W.2d 876, 879 n. 8 (Mich. App. 1985) ("We find no support for such a bifurcated application of the word 'person'").

suits under section 1983.[15] The largest group of state court insist that Quern v. Jordan held that states are not "persons", and thus can never be sued in a state court section 1983 action.[16] The

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[15] Kristensen v. Strinden, 343 N.W.2d 67, 76-77 and n. 11 (N.D. 1983) (holding state immune from suit without "deciding) whether or not a state is a 'person' under the statute"); Kapil v. Ass'n of Pa. State College, 448 A.2d 717, 720 and n. 6, 68 Pa. Comm. W. 287 (1982), rev'd on other grounds, 504 Pa. 92, 470 A.2d (1983) (relying on "a state's 'traditional' sovereign immunity"); Karchefske v. Dept. of Mental Health, 371 N.W.2d 876, 878-81 (Mich. App. 1985) (although "the state is a 'person' for purposes of § 1983 liability", state can assert absolute immunity); see also Hampton v. State of Michigan Dep't of Corrections, 144 Mich. App. 794, 377 N.W.2d 920, 923 (1985) (Gillis, J., concurring in part and dissenting in part) (although state is "a 'person' for purposes of 42 U.S.C. § 1983, state's immunity rules apply").

[16] Boldt v. State, 305 N.W.2d 133, 144, 101 Wis.2d 566, "a state is not a 'person' within the meaning of sec. 1983 . . . . Quern v. Jordan"), cert. denied, 454 U.S. 973 (1981); Hampton v. State of Michigan Dep't of Corrections,

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144 Mich. App. 794, 377 N.W.2d 920, 923 (1985) ("it is our opinion based on Quern . . . that the term 'person' in § 1983 was not intended to include states and state agencies"); Edgar v. State, 92 Wash.2d 217, 595 P.2d 534, 537 (1979) ("The question . . . in Quern . . . was whether the word 'person' as used in this statute included states. It is the inescapable holding of the court that it did not"; also citing Edelman); State v. Green, 633 P.2d 1381, 1382 (Alaska 1981) ("We interpret Quern v. Jordan as holding . . . that states are not 'persons' within the meaning of the section"); Merritt for Merritt v. State, 696 P.2d 871, 877, 108 Idaho 20 (1985) ("We interpret Quern v. Jordan to hold . . . that the states are not 'persons' for purposes of § 1983"); DeVargas v. State, 97 N.M. 450, 640 P.2d 1327 (Ct. App. 1981); cert. quashed, 97 N.M. 563, 642 P.2d 166 (1982); Woodbridge v. Worcester State Hosp., 384 Mass. 38, 423 N.E.2d 782, 786 n. 7 (1981) ("Quern . . . reaffirmed the Court's prior holding Edelman . . . that States are not 'persons' for purposes of § 1983"); Pyne v. Meese, 218 Cal. Rptr. 87, 92, 172 Cal. App.3d 402 (1985) ("a state is not a 'person' under section 1983"; citing Quern and Edelman); Mezey v. State, 208 Cal. Rptr. 40, 43, 161 Cal. App. 3d 1066 (Cal. App. 1 Dist. 1984) ("a state and its agencies are not 'persons' within the meaning of section 1983"; citing Alabama v. Pugh, 438 U.S. 781 (1978)).

lower federal courts are evenly divided regarding whether Quern so held.[17] Ironically, the courts which construe

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[17] Four federal decisions conclude that a state is a "person" for section 1983 purposes. Della Grotta v. State of Rhode Island, 781 F.2d 343, 348 (1st Cir. 1986) ("states are 'persons' potentially liable for constitutional deprivations"); Marrapese v. Rhode Island, 500 F. Supp. 1207, 1210-12 (D.R.I. 1980); Irwin v. Calhoun, 522 F. Supp. 576, 583-84 (D. Mass. 1981); R.I. Affiliate Am. Civ. Liberties v. R. I. Lottery, 553 F. Supp. 752, 767 (D.R.I. 1982) ("Congress intended state administrative agencies . . . to be 'persons' within the meaning of § 1983"). Cf. Verner v. State of Colorado, 533 F. Supp. 1109, 1113 (D. Colo. 1982) ("there is a strong argument that states are 'persons' under § 1983").

Three federal decisions have arrived at the contrary conclusion. Bailey v. Ohio State University, 487 F. Supp. 601, 603 (S.D. Ohio 1980) ("a state is not a 'person' under § 1983"); Brown v. Supreme Court of Nevada, 476 F. Supp. 86, 89 (D. Nev. 1979) ("an agency of the State . . . is not a 'person' under" section 1983); Thompson v. New York, 487 F. Supp. 212, 226 (N.D.N.Y. 1979) ("this Court is bound by Quern's . . . holding that a State is not a 'person' within the meaning of" section 1983).

Quern to bar state court suits against states rely primarily on Justice Brennan's separate opinion, which criticized the Quern decision for so holding,[18] while the courts which hold that states are "persons" rely on the

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18 Kristensen v. Strinden, 343 N.W.2d 67, 77 n. 11 (N.D. 1983) ("the concurring opinions of Justices Brennan and Marshall in Quern" read the majority opinion "as having definitely settled the question); Hampton v. State of Michigan Dep't of Corrections, 144 Mich. App. 794, 377 N.W.2d 920, 922 (1985) (court's view that Quern holds states are not persons "was the position taken by Justice Brennan, concurring in Quern"); Edgar v. State, 92 Wash.2d 217, 595 P.2d 534, 537 (1979), (citing Justice Brennan's "dissent" in Quern), cert. denied. 444 U.S. 1077 (1980); State v. Green, 633 P.2d 1381, 1382 (Alaska 1981) (same); Merritt for Merritt v. State, 696 P.2d 871, 877, 100 Idaho 20 (1985) ("As Justice Brennan's concurring opinion points out, the majority opinion implicitly includes . . . a decision" that states are not "persons"); Woodbridge v. Worcester State Hosp., 384 Mass. 38, 423 N.E.2d 782, 786 n. 7 (1981) (relying on "the concurring opinions of Justices Marshall and Brennan")

majority opinion of Chief Justice Rehnquist.[19]

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[19] Smith v. State, 333 N.W.2d at 55; Gumbhir v. Kansas State Bd. of Pharmacy, 231 Kan. 507, 646 P.2d 1078, 1084 (1982) ("Justice Rehnquist's majority opinion carefully skirted the issue"); Karchefske v. Dept. of Mental Health, 371 N.W.2d 876, 878 (Mich. App. 1985) ("Justice Brennan's characterization of the majority opinion in Quern is in error"); Marrapese v. State of Rhode Island, 500 F. Supp. 1207, 1211 (D.R.I. 1980) ("Justice Rehnquist's opinion . . . conspicuously avoided any statement that the term 'person' did not include 'state'"); State v. Green, 633 P.2d 1381, 1382 (Alaska 1981) (Rabinowitz, C. J., dissenting) ("Justice Rehnquist's opinion in fact carefully avoids that issue . . . . Under Justice Rehnquist's approach the states are free to render themselves amenable to suit under 42 U.S.C. § 1983; under Justice Brennan's approach, this is not the case"); Marrapese v. State of R.I., 500 F. Supp. 1207, 1211 and n. 9 (D.R.I. 1980) ("Justice Rehnquist's opinion . . . conspicuously avoided any statement that the term 'person' did not include 'state' . . . . The Court's refusal to cast its discussion in the form of a 'person' analysis is all the more striking in light of Justice Brennan's vehement . . . concurring opinion . . . .")

The state of the law in the lower courts is more conflicting, and incongruous, than even the previous paragraph suggests. There are intrastate conflicts between state courts in Michigan, New Mexico, and Alaska.[20] Several state courts appear to hold that the Eleventh Amendment is literally applicable to state judicial proceedings.[21] A number of decisions argue that "[i]t would be anomalous, to say the least", if Congress had authorized the filing in state courts of section 1983 actions which could not be

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[20] Compare Ramah Navajo School Bd. v. Bureau of Revenue, supra n. 14 with DeVargas v. New Mexico Dep't of Corrections, supra n. 16; compare Brown v. Wood, supra n. 13, with State v. Green, supra n. 16; compare Smith v. State, supra n. 13, with Hampton v. State of Michigan Dep't of Corrections, supra n. 16.

[21] See n. 7, supra.

brought in federal court[22]; Maine v. Thiboutot expressly rejected the suggestion that there was any "inherent illogic" in consigning a subset of section 1983 cases to state courts.[23] A Wisconsin court held in 1981 that counsel fees under section 1988 coould be obtained against a state in state court because the state itself could not be sued under section 1983[24], a result

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22 Karchefske v. Dept. of Mental Health, 37 N.W.2d 876, 871 (Mich. App. 1985) ("anomalous"); Hampton v. State of Michigan Dep't of Corrections, 377 N.W.2d 920, 922, 144 Mich. App. 794 (1985) ("unlikely").

23 448 U.S. at 8 n. 6, 11 n. 12.

24 Boldt v. State, 101 Wis.2d 566, 305 N.W.2d 133, 143-44, cert. denied, 454 U.S. 973 (1981):

> "The petitioner is not entitled to recovery under sec. 1983 . . . because the state is not subject to suit under sec. 1983 . . . . Since recovery of actual attorney's fees under

squarely contrary to this Court's 1980 decision in Maine v. Thiboutot. A New York decision goes so far as to assert that a state, by adopting an indemnification statute, can extend its Eleventh Amendment immunity to bar state court section 1983 suits against individual state officials.[25]

But at this point in the evolution of Eleventh Amendment, considerably more is at issue than whether state court actions may be maintained against state agencies under section 1983 or pursuant to any other specific federal statute. The inconclusive result in Welch, coupled

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> sec. 1988 is dependent on a successful suit being brought under sec. 1983, the petitioner is not entitled to recover actual attorney's fees."

[25] Brody v. Leamy, 393 N.Y.S.2d 243, 262, 90 Misc.2d 1, 28 (Sup. Ct. Dutchess Cty 1977).

with the retirement of Justice Powell, has left litigants and the lower courts, as well as federal and state legislators, in serious and understandable uncertainty as to whether Hans, Edelman, and their progeny are still good law. The time has come, we believe, to consider anew the meaning of the Eleventh Amendment, and to craft an interpretation of that Amendment which can command the predictable support of a substantial majority of this Court.

If this Court were to overrule Hans and its progeny, the decision below would fall as a matter of course. The refusal of the Florida courts to hear in state court section 1983 suits against the state rests squarely, and expressly, on Hans, Edelman and Quern.[26] If, as we

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[26] Hill v. Department of Corrections, 513 So.2d 129, 139-31 (Fla. 1987).

urge, this Court were to hold that section 1983 suits may be maintained against states in federal courts, state courts would necessarily be required to entertain such suits as well, since Martinez v. California, 444 U.S. 277 (1980), forbids the states to accord to section 1983 defendants immunities broader than those which would be available were the same action brought in federal court.[27]

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[27] 444 U.S. at 283 n. 8:

> "Conduct ... which is wrongful under 42 U.S.C. § 1983 ... cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.... The immunity claim raises a question of federal law."

CONCLUSION

For the above reasons a writ of certiorari should be granted to review the judgment and opinion of the Supreme Court of Florida.

Respectfully submitted,

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APPENDIX

ROBERT EDWARD SPOONER,

Petitioner,

DEPARTMENT OF CORRECTIONS,

Respondent.

MAURICE SKOBLOW,

Petitioner,

v.

AMERI-MANAGE, INC., et al.,

Respondents.

Nos. 68932, 68522

Supreme Court of Florida.

Sept. 24, 1987.

Rehearing Denied Dec. 1, 1987

F. Kendall Slinkman, West Palm Beach, and Edna L. Caruso, P.A., West Palm Beach, for petitioner, Spooner.

Robert A. Butterworth, Atty. Gen., and Mitchell, D. Franks, Chief Trial counsel and Thomas H. Bateman, III, Asst.

Atty. Gen., Tallahassee, for respondent, Dept. of Corrections.

Ira J. Kurzban of Kurzban, Kurzban and Weinger, Miami, and Joel V. Lumer, Miami, for Nat. Emergency Civil Liberties Committee, amicus curiae.

Stephen T. Maher, Coral Gables, and Sharon L. Wolfe, Miami, for American Civil Liberties Union Foundation of Florida, Inc., amicus curiae.

Robert Weisberg of Lipman & Weisberg, P.A., Miami, and Sharon L. Wolfe of Cooper, Wolfe & Bolotin, P.A., Miami, for petitioner, Skoblow.

Robert A. Butterworth, Atty. Gen., and Mitchell D. Franks, Chief Trial Counsel and Craig Willis, Asst. Atty. Gen., Tallahassee, for respondents, Ameri-Manage, Inc., et al.

OVERTON, Justice.

The First District Court of appeal, in Spooner v. Department of Corrections, 488 So.2d 897 (Fla. 1st DCA 1986), certified the following question to this Court:

> Has the State of Florida, pursuant to Section 768.28, Florida Statutes (1983), waived its Eleventh Amendment and state common law immunity and consented to suits against the State and its agencies under 42 U.S.C. § 1983?

Id. at 898.

The above case was consolidated with Skoblow v. Ameri-Manage, Inc., 483 So.2d 809 (Fla. 3d DCA 1986), which concerns the identical issue, without certification of the question. We have jurisdiction. Art. V, § 3(b)(4).

We answer the question in the negative for the reasons expressed in our recent decision in Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987).

We approve the decision of the First District Court of Appeal in Spooner and that of the Third District Court of Appeal in Skoblow, holding the state immune under the eleventh amendment and the common law from suits arising under the federal Civil Rights Act, 42 U.S.C. U.S.C. § 1983.

It is so ordered.

McDONALD, C.J., and EHRLICH, SHAW, GRIMES and KOGAN, JJ., concur.

Maurice SKOBLOW, Appellant,

v.

AMERI-MANAGE, INC., Robert A. Burton, John Pitrelli, Elsa Dominguez, Barbara McMurtrey, Jackie Dale and Paul Uhrig, Appellees.

No. 85-1741

District Court of Appeal of Florida,

Third District.

Feb. 18, 1986.

Lipman & Weisberg and Robert Weisberg, Miami, for appellant.

Jim Smith, Atty. Gen., and Craig Willis, Asst. Atty. Gen., for appellees.

Before HENDRY, HUBBART and NESBITT, JJ.

PER CURIAM.

The plaintiff appeals an order entering partial summary judgment for the defendants. We affirm.

The plaintiff was employed as a dentist at South Florida State Hospital. The hospital is a mental institution which is owned, funded and regulated by the State of Florida. Pursuant to a contract with the state, Ameri-Manage, Inc., provides management services at the hospital. On February 13, 1981, the plaintiff was notified of his termination from employment at the hospital by a letter from Robert Burton, the chief executive officer of the hospital and an employee of Ameri-Manage. This letter indicated that the plaintiff was being discharged because of "inadequate performance in carrying out your duties and responsibilities."

Two weeks later, an article appeared in the Miami Herald concerning the plaintiff's discharge. Four officials of

the hospital or state were reported in the article to have given negative statements about the plaintiff's work as a dentist at the hospital. These officials were Jackie Dale, the community and patient relations director at the hospital (referred to in the article as the hospital spokeswoman), Barbara McMurtrey, the human resources director (personnel officer) at the hospital, Dr. Paul Uhrig, the director of the state's Division of Institutional Dental Services, and Dr. Elsa Dominguez, the dental services coordinator at the hospital and the plaintiff's immediate supervisor.

The plaintiff filed a two-count complaint against the defendants. In the first count, the plaintiff brought an action for defamation against Dale,

McMurtrey, Uhrig and Dominguez. Burton was also named in this count on the asserted basis of a civil conspiracy with the other named defendants to commit the defamation. In the second count, the plaintiff alleged a civil rights violation pursuant to 42 U.S.C. § 1983 regarding his termination at the hospital. Ameri-Manage and Burton were named as defendants in this count. The defendants filed a motion for partial summary judgment on the basis of absolute privilege and sovereign immunity. Partial summary judgment was entered in favor of the defendants and this appeal followed.

In McNayr v. Kelley, 184 So.2d 428 (Fla. 1966), the supreme court first recognized an executive official's absolute immunity from defamation actions

based on statements made in connection with the performance of his duties and responsibilities. The court recognized that executive officials had the same absolute immunity afforded members of the judicial and legislative branches of government. 184 So.2d at 433. Subsequently, the supreme court explained the need for this immunity protection in a case with facts similar to those in the present case:

> The public interest requires that statements made by officials of all branches of government in connection with their official duties be absolutely privileged. Under our democratic system the stewardship of public officials is daily observed by the public. It is necessary that free and open explanations of their actions be made. Any public servant should expect that those having authority to discharge him will explain their reasons for such dismissal.

Hauser v. Urchisin, 231 So.2d 6, 8 (Fla. 1970). The scope of the absolute

immunity has been extended to private communications and the emphasis has shifted to the "nature of the officer's duties rather than the level of his rank." City of Miami v. Wardlow, 403 So.2d 414, 416 (Fla. 1981). See Cripe v. Board of Regents, 358 So.2d 244 (Fla. 1st DCA), cert. denied, 365 So.2d 710 (Fla. 1978); Johnsen v. Carhart, 353 So.2d 874 (Fla. 3d DCA 1977). Thus, the controlling issue in deciding whether a public employee is absolutely immune from actions for defamation is whether the communication was within the scope of the employee's duties. Wardlow, 403 So.2d at 416.

In the present case, all the defendants alleged to have defamed the plaintiff either had official supervisory responsibility over the plaintiff or had

responsibilities regarding personnel matters or community relations. Since the statements made concerning the plaintiff's discharge were related to and made within the scope of the defendants' official duties, we hold that these defendants are entitled to an absolute privilege and are, therefore, immune from liability for the alleged defamation. See Wardlow; Hauser; Mueller v. The Florida Bar, 390 So.2d 449 (Fla. 4th DCA 1980); Cripe; Johnsen. Accordingly, summary judgment was properly entered in favor of Dale, McMurtrey, Uhrig and Dominguez on the defamation count. Likewise, summary judgment was properly entered in favor of Burton on this count. See Perdomo v. Jackson Memorial Hospital, 443 So.2d 298 (Fla. 3d DCA 1983) (where count regarding the goal of a conspiracy

(defamation) fails, so too the conspiracy count fails).

We also affirm the summary judgment entered in favor of Ameri-Manage on the section 1983 action in the plaintiff's second count. Absent an unequivocal expression of intent by either the United States Congress to overturn a state's eleventh amendment immunity, or a state legislature to waive the state's sovereign immunity, a state and its agencies are immune from civil rights actions brought against them pursuant to section 1983 in both federal and state courts. See Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979); art. X, § 13, Fla. Const. See also Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); Ford Motor Co. v.

Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945); Ex Parte: In re the State of New York, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921). The plaintiff does not argue that the Florida legislature has waived the state's sovereign immunity so as to allow civil rights actions against it.[1] See

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[1] In this regard, see the discussion in Shinholster v. Graham, 527 F.Supp. 1318 (N.D. Fla. 1981). The court in Shinholster reviews the relevant legislation and concludes that the Florida legislature has not waived its eleventh amendment immunity to civil rights suits. The court's analysis is equally applicable to the issue of whether the legislature has waived the state's sovereign immunity in civil rights actions brought in state court. We find that analysis persuasive and hereby adopt it. See also Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 734 F.2d 730 (11th Cir. 1984); Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983); Ostroff v. Florida Dep't of Health & Rehabilitative Services, 554 F. Supp. 347 (M.D. Fla. 1983). Contra Meeker v. Addison, 586 F. Supp. 216 (S.D. Fla. 1984).

art. X, § 13, Fla. Const. Instead, the plaintiff argues that Ameri-Manage is not a state agency for purposes of sovereign immunity in civil rights actions. We reject the plaintiff's argument.

An examination of the legal relationship between Ameri-Manage and the state is dispositive. Pursuant to a contract between the state and Ameri-Manage, Ameri-Manage was to provide direct management for South Florida State Hospital, a state-owned hospital, coordinate the development of a long-range plan for the hospital consistent with legislative mandate, and assist the Department (HRS) in planning for interim

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We note that the Eleventh Circuit Court of Appeals has recently approved the decision in Shinholster and rejected the reasoning in Meeker. See Gamble v. Florida Dep't of Health & Rehabilitative Services, 779 F.2d 1509 (11th Cir. 1986).

and long-range forensic services. HRS delegated to the administrator of the hospital (Burton, an employee of Ameri-Manage), among other things, the authority to (1) "appoint grievance committee members and render a final decision on employee grievances"; (2) "effect personnel actions as specified in HRSR 60-10, 10(a) . . . [and] hold presuspension/termination conferences and establish procedures for same"; (3) "submit personnel actions to the State Personnel Director directly, as specified in HRSR 60-94(a)(1)(26)"; (4) "assign to established classes new positions authorized by the legislature"; (5) "assign to established classes new positions authorized by the Administrative Commission"; (6) "assign to an established class any position that

is added in lieu of a position that is deleted"; (7) "reclassify positions to existing Career Service Classes"; (8) "respond to Collective Bargaining Step One Grievances"; (9) "effect all types of disciplinary actions as stated in HRSR 60-10 paragraph 5. This includes oral reprimand, written reprimand, change in assignment, reduction in pay, demotion, suspension and dismissal." [emphasis added] It was the exercise of this last-stated delegated authority which gave rise to the plaintiff's claim under section 1983.

An examination of the relationship between Ameri-Manage and the State of Florida leads us to the conclusion that Ameri-Manage was operating as an agency of the state at the time of the plaintiff's discharge from his position

at the hospital. See Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 734 F.2d 730 (11th Cir. 1984). See also Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Ford Motor Co. Cf. § 768.28(2), Fla. Stat. (1985) (defining "state agencies" for purposes of the statute waiving sovereign immunity in tort actions as including "corporations primarily acting as instrumentalities or agencies of the state"). Since the Florida legislature has not waived the state's sovereign immunity in civil rights actions, see Gamble v. Florida Dep't of Health & Rehabilitative Services, 779 F.2d 1509 (11th Cir. 1986); Shinholster v. Graham, 527 F. Supp. 1318 (N.D. Fla. 1981);[2] art. X, § 13, Fla. Const., the summary

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[2] See supra note 1.

judgment in favor of Ameri-Manage on the plaintiff's second count alleging a civil rights violation was properly entered.

The parties are in agreement that Burton can be held liable in his individual capacity for any civil rights violations that might have occurred. Accordingly, the summary judgment entered in favor of all of the defendants on plaintiff's defamation count is affirmed, the summary judgment entered in favor of Ameri-Manage on the count alleging a civil rights violation is affirmed, and the cause is remanded to the trial court for further proceedings.

IN THE

CIRCUIT COURT

OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE No. 82-606-CA-13

MAURICE SKOBLOW,

Plaintiff,

v.

AMERI-MANAGE, INC., ROBERT A. BURTON, ELSA DOMINGUEZ, BARBARA McMURTREY, JACKIE DALE and PAUL UHRIG,

Defendants.

PARTIAL SUMMARY JUDGMENT

THIS CAUSE having come to be heard on the Defendants' Motion for Partial Summary Judgment and the Court after hearing argument of counsel, reviewing the file and memoranda, and being

otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that Defendants' Motion for Partial Summary Judgment is GRANTED and therefore partial summary judgment is hereby entered in favor of the defendants.

DONE and ORDERED at Miami, Dade County, Florida, this 27th day of June, 1985.

Rosemary Usher Jones
CIRCUIT COURT JUDGE

Supreme Court, U.S.
FILED
APR 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1454

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988**

MAURICE SKOBLOW,
Petitioner,

v.

AMERI-MANAGE, INC.,
Respondent.

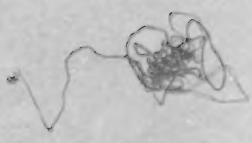
RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

DOES THE ELEVENTH AMENDMENT, OR A STATE'S COMMON LAW SOVEREIGN IMMUNITY, CONFER IMMUNITY UPON THE STATE FROM A SUIT BROUGHT PURSUANT TO 42 U.S.C. SECTION 1983 WHEN THE SUIT IS FILED IN STATE COURT.

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STATEMENT OF THE CASE

The Florida Supreme Court ruled in this case that the State of Florida was immune under the Eleventh Amendment and the state's common law sovereign immunity from suits arising under the federal Civil Rights Act, 42 U.S.C. Section 1983. Skoblow v. Ameri-Manage, Inc., 514 So.2d 1077 (Fla. 1987).

This case was consolidated in the Florida Supreme Court with Spooner v. Department of Corrections, 488 So.2d 897 (Fla. 1st DCA 1986), in which the First District Court of Appeal had certified the following question:

> Has the State of Florida pursuant to Section 768.28, Florida Statutes (1983), waived its Eleventh Amendment and state common law immunity and consented to suits against the State and its agencies under 42 U.S.C. §1983?

The identical question was certified by the Third District Court of Appeal to the Florida Supreme Court in Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987). In reaching the answer to the above-quoted question in the present case, the Florida high court relied upon its decision in Hill. While the Florida Supreme Court in Hill primarily addressed the issue certified by the District Court of Appeal, the supreme court did confront the issue Petitioner seeks to have reviewed in this Court. Hill had contended that the state has no common law sovereign immunity against a suit brought under federal law alleging the violation of a federal constitutional right. The Florida Supreme Court in Hill, supra, at 131, stated:

> At the outset, we note that even though Quern was a federal court action involving the eleventh amendment, the United States Supreme Court made the

> statement in that case that Congress in enacting section 1983, did not intend "to override the traditional sovereign immunity of the States." 440 U.S. at 341, 99 S.Ct. at 1145.

The Florida court went on to cite, and extensively quote from, a number of state court decisions throughout the country that have decided this issue in accordance with the conclusions reached in Quern v. Jordan, 440 U.S. 332 (1979).

SUMMARY OF ARGUMENT

Review of the decision of the Florida Supreme Court is unwarranted because neither Congress nor the Florida Legislature has expressed an intent to waive the state's common law sovereign immunity from suits brought pursuant to 42 U.S.C. Section 1983.

Petitioner seeks to have this Court overturn one hundred years of judicial interpretation of constitutional law dating back to Hans v. Louisiana, 134 U.S. 1 (1890). In order to accommodate the supremacy of federal law to the constitutional immunity of the States under our federal system of government, this Court has required an express legislative abrogation of the states' immunity. It has previously decided that Congress has not expressed an intent to subject the states

to liability under 42 U.S.C. Section 1983. Congress has the power to abrogate the State's sovereign immunity pursuant to its authority in the Fourteenth Amendment to enact legislation protecting individual civil rights. Pursuant to the supremacy clause contained in Article VI of the Federal Constitution, such enactment would be applicable to suits brought in state as well as federal court. Congress has been on notice since 1979 as to this Court's interpretation of Section 1983 suits against a State, but has elected not to exercise its power to abrogate the states' immunity under the Fourteenth Amendment.

Petitioner's petition for review amounts to a plea to reconsider decades of settled constitutional law because there is a new complement of justices on this Court. This is not one of the criteria set forth by this Court as reason for review.

Under these circumstances, review of this issue by the Court is unwarranted.

This Court recently denied certiorari review of this case's companion case, Hill v. Department of Corrections, _____ U.S. _____, 108 S.Ct. 1024 (1988), which raised the identical issue. It should do so in this case as well.

ARGUMENT

A GRANT OF CERTIORARI IS NOT WARRANTED IN THIS CASE BECAUSE THE DECISION OF THE FLORIDA SUPREME COURT RELIES ON SETTLED FEDERAL LAW AND NO FURTHER RECONSIDERATION OF THIS COURT'S INTERPRETATION OF CONSTITUTIONAL LAW IS WARRANTED.

The Florida Supreme Court decided that the State and its agencies were immune from suits brought pursuant to the federal Civil Rights Act, 42 U.S.C. Section 1983. Skoblow v. Ameri-Manage, Inc., 514 So.2d 1077. The Florida court relied, in part, on its decision in a companion case, Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987). This Court recently denied a petition for a writ of certiorari to the Supreme Court of Florida to review that court's judgment and opinion in Hill. Hill v. Florida Department of Corrections, ___ U.S. ___, 108 S.Ct. 1024 (1988). The Court

should similarly deny the Petition in this case since the issue is identical.

The thrust of Petitioner's plea for review is simply that two new justices are now on the Court. Because the Court now has a new complement of justices, Petitioner pleads for a general revision of constitutional jurisprudence - presumably one that is in accord with his own view.[1] This can hardly be a legitimate basis for review, and Petitioner's plea should be firmly denied.

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[1] Petitioner even goes so far as to urge the Court to hold that Section 1983 suits can be maintained against states in federal courts. This request is congruent with Petitioner's position that Hans v. Louisiana, 134 U.S. 1 (1890) was decided on infirm constitutional grounds and should be overruled. Interestingly, Petitioner does not ask the Court to go even further back in time and reconsider its decision in Chisholm v. Georgia, 1 L.Ed. 440 (1793), or review implicit limitations contained in Article III of the Constitution.

Petitioner was able to unearth only three state court decisions which have held that states are "persons" within the meaning of Section 1983. Petition at 29-30. A review of these three decisions is illuminating and dispells Petitioner's claim that the states are in philosophical disarray and confusion. Petition at 29. In Smith v. Department of Public Health, 333 N.W.2d 50 (Mich. App. 1983), the Court of Appeals of Michigan concluded, among other things, that the state was a "person" for purposes of Section 1983 and amenable to suit thereunder. Later decisions of that court and the Michigan Supreme Court overruled this earlier conclusion and ruled that the term "persons" as used in Section 1983 was not intended to include states and state agencies. See, Hampton v. State of

Michigan, 377 N.W.2d 920, 923 (Mich. App. 1985) and Smith v. Department of Public Health, 410 N.W.2d 749, 792 (Mich. 1987).

In Maldonado v. Nebraska Dept. of Public Welfare, 391 N.W.2d 105, 109-110 (Neb. 1986), the Nebraska Supreme Court held that the state had waived its sovereign immunity by the terms of its participation in federal programs, and therefore, the state was liable for attorney fee awards under Section 1988. Thus, Maldonado is inapposite to the present issue because of that court's determination the state had waived its sovereign immunity. A finding of a waiver of sovereign immunity presupposes the validity of that constitutional principle in the first instance.

In Brown v. Wood, 592 P.2d 1250 (Alaska 1979), the Alaska Supreme Court held that the University of Alaska could be held

liable in a suit under 42 U.S.C. Section 1983. This decision relied on Monell v. New York Dept. of Social Services, 436 U.S. 658 (1978), and did not review the clarification of Monell provided in Quern v. Jordan, 440 U.S. 332 (1979). Petitioner does not point out that the Alaska Supreme Court subsequently reversed its position on this issue in State v. Green, 633 P.2d 1381 (Alaska 1981), in reliance on Quern v. Jordan, supra, thereby overruling Brown v. Wood.

This Court settled, for purposes of constitutional jurisprudence, the issue of whether the states are subject to suit under 42 U.S.C. Section 1983 in Quern v. Jordan, supra. The Court held that Congress, in adopting a provision in 1871 which is now 42 U.S.C. Section 1983, did not intend to override the traditional sovereign immunity of the states and

subject them to liability under the Act. In Quern the discussion of the nature of the states' immunity was not limited to Eleventh Amendment immunity. In reaching its determination that Congress had not expressed an intent to override the states' traditional sovereign immunity, and that the several states therefore were not "persons" for purposes of the statute, this Court stated:

> Given the importance of the States' traditional sovereign immunity, if in fact the members of the 42d Congress believed that s.1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act.

440 U.S. at 343.

While the Eleventh Amendment is a bar to the exercise of the judicial power of the federal courts, this Court has

recognized that Eleventh Amendment immunity is merely an exemplification of the states' traditional sovereign immunity directed towards the federal courts. As stated in Ex parte State of New York No. 1, 256 U.S. 490, at 497 (1921):

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given; not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

This Court has made it clear that its interpretation of the Eleventh Amendment is an attempt to accommodate the states' traditional sovereign immunity under a federal form of government with Congress' enumerated powers under Section 5 of the Fourteenth Amendment. Pennhurst v. State School & Hospital v. Halderman, 465 U.S. 89 (1984); Edelman v. Jordan, 415 U.S. 651 (1974).

It is readily acknowledged that Congress has the authority under the Fourteenth Amendment to abrogate the states' Eleventh Amendment and traditional sovereign immunity. If Congress were to enact legislation making the states "persons" for purposes of 42 U.S.C. Section 1983, a state could be subjected to liability under the statute regardless of whether the suit was brought in federal or state court.

In Quern, Justice Brennan realizing the full implication of the majority's opinion, attempted in dissent to characterize the Court's conclusion that a State is not a "person" for purposes of Section 1983 as "patently dicta." However, the majority opinion in response stated:

> Mr. Justice BRENNAN's opinion characterizes this conclusion [that Congress did not intend by the general language of s. 1983 to override the traditional sovereign immunity of the States] as "gratuitous" and "paten[t] dicta." Post, at 1150. But we cannot think of a more "gratuitous" or useless exercise of this Court's discretionary jurisdiction than to decide which of two conflicting interpretations of Edelman v. Jordan is correct, if in truth we believed that Edelman itself no longer were valid. The question does not arise out of the blue; it was extensively discussed in our brother BRENNAN's concurrence in Hutto v. Finney last Term. We therefore fail to see how our reaffirmance of Edelman can be characterized as "dicta."

440 U.S. at 341.

The state courts addressing this issue have understood this Court's ruling and have relied on Quern v. Jordan, supra, and its predecessor, Edelman v. Jordan, 415 U.S. 651 (1974), in reaching the conclusion that the states are not subject to liability under 42 U.S.C. Section 1983. See, e.g., Greene v. Friend of Court, Polk County, 406 N.W.2d 433 (Iowa 1987); State v. Green, 633 P.2d 1381 (Alaska 1981); Pyne v. Meese, 172 Cal.App.3d 392, 403, 218 Cal. Rptr. 87, 92 (1985); Merritt v. State, 696 P.2d 871 (Idaho 1985); DeVargas v. State ex rel. N.M. Dept. of Corrections, 640 P.2d 1327 (N.M. Ct. App. 1981); Karchefske v. Dept. of Mental Health, 371 N.W.2d 876 (Mich. App. 1985); Gay v. State of Texas, 730 S.W.2d 154 (Tex.App. 1987); DeBleecker v. Montgomery County, 438 A.2d 1348 (Md. 1982); Kristensen v. Strinden, 343 N.W.2d 67 (N.D. 1983).

This Court has denied certiorari in instances where Petitioners have sought to have this issue reviewed again. See, e.g., Ramah Navajo School Board v. Bureau of Revenue, 720 P.2d 1243 (N.M. App. 1986), cert. denied, _____ U.S. _____, 107 S.Ct. 423, 93 L.Ed.2d 373 (1986); Edgar v. State, 595 P.2d 534 (1979), cert. denied, 444 U.S. 1077, 100 S.Ct. 1026, 62 L.Ed.2d 760 (1980). And see the Court's disposition of this case's companion case in the Florida Supreme Court, Hill v. Florida Dept. of Corrections, 513 so.2d 129 (Fla. 1987), cert. denied, _____ U.S. _____, 108 S.Ct. 1024 (1988).

This Court has declared that Section 5 of the Fourteenth Amendment vests Congress with the power, where unequivocally expressed, to "overturn the constitutionally guaranteed immunity of the several States." Quern v. Jordan, supra at 342. Petitioner, at 21,

states that this rule of construction "has not proven to be a particularly reliable method of ascertaining congressional intent." Petitioner cites in support of this statement two instances in which Congress has amended the law in response to this Court's application of this rule in determining the scope of legislative enactments. There are, however, alternative perspectives on the analysis of these jurisprudential developments. Rather than viewing these cases as this Court's mistaken interpretation of Congressional intent, they can be viewed from the perspective of the different roles courts and Congress play in the evolution of the law. In this role the Court can be viewed as defining legislative parameters, thereby allowing Congress the opportunity to make clear choices concerning the law's development or stability. This role is

consistent with a philosophy of judicial restraint.

Litigants have contended that the application of the states' sovereign immunity to civil rights actions brought in state court results in the total foreclosure of any forum, state or federal for the redress of constitutional wrongs. This contention creeps into Petitioner's brief at pages 24 through 29, and is patently misleading. A 1983 suit may be brought properly in state or federal court against a state official in his "personal capacity" for a violation of an individual's civil rights and it may seek monetary, declaratory, or injunctive relief. There is no constitutional impediment to civil rights actions against local governments which are not part of the state for Eleventh Amendment purposes. Monell v. Dept. of Social Services of City

of N.Y., 436 U.S. 658 (1978). Injunctive relief is available against state officials. Edelman v. Jordan, 415 U.S. 651 (1974); Ex parte Young, 209 U.S. 123 (1908). Attorney's fees are available in actions brought on behalf of persons who are deprived, under color of state law, of a right secured by the Constitution and laws of the United States whether brought in federal or state court. Maine v. Thiboutot, 448 U.S. 1 (1980).

Thus, what Petitioner is really seeking are unlimited compensatory and punitive damages collectible from the state treasuries. For Petitioner to contend that he has been deprived of a judicial forum for the exoneration of important civil rights is, at best, disingenuous.

The test enunciated by this Court requires Congress to unequivocally express its legislative will on issues having far-

reaching societal implications. This is not so great a burden to place on Congress and is an approach consistent with sound principles of judicial restraint. As Petitioner points out, Congress has not been shy about amending the law in the past where there was a legislative perception of a need for change. In fact, Congress recently flexed its legislative muscle in overriding the President's veto of the Civil Rights Restoration Act, Pub. L. No. 100-259. Congress has been on notice since 1979 of this Court's ruling in Quern v. Jordan. If there is a societal need to abrogate the states' immunity, it is incumbent upon Congress to act.

CONCLUSION

The Florida Supreme Court's decision in Skoblow v. Ameri-Manage, Inc., relies on established constitutional law that the states' sovereign immunity bars liability from actions brought pursuant to 42 U.S.C. Section 1983. Development in this area of the law should be the result of legislative enactment, not judicial tinkering with settled constitutional principles. Congress has expressed no intent to abrogate the states' immunity under Section 1983. Under these circumstances, the Petition for writ of certiorari should be denied.

Respectfully submitted this 1st day of April, 1988.

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